UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

MULTIBAND EC, INC.,	)	
	)	
Employer,	)	
	)	
and	)	
	)	
CHAUFFEURS, TEAMSTERS, WAREHOUSEMEN and HELPERS LOCAL UNION 135,	)	**Case No. 25-UD-079779**
	)	
Union,	)	
	)	
And	)	
	)	
ORLANDO CANTU,	)	
	)	
Petitioner.	)	

EMPLOYER'S ANSWERING BRIEF IN OPPOSITION TO LOCAL 135'S EXCEPTIONS

Respectfully submitted by:

Gregory H. Andrews (IARDC No. 6209480)
Jackson Lewis LLP
150 North Michigan Avenue, Suite 2500
Chicago, Illinois 60601
Gregory.Andrews@jacksonlewis.com
(p) 312.787.4949

Attorney for Employer, Multiband EC, Inc.

The Employer, Multiband EC, Inc., by its attorney, Gregory H. Andrews, hereby states its Answer to the Brief of Union in Support of Exceptions to Hearing Officer's Report and Recommendations[1] filed by the Local Union 135, Chauffeurs, Teamsters, Warehousemen And Helpers, concerning the deauthorization Petition filed by Petitioner, Orlando Cantu, on April 27, 2012, and in support thereof states as follows:

1. **The Union Failed To Meet Its Burden Regarding Its Objections And Exceptions, And The Objections Should Therefore Be Dismissed.**

As an initial matter, the Union, as objecting party, has the burden of demonstrating not only that the alleged objectionable conduct occurred, but also that the conduct interfered with the free choice of employees to such a degree that it materially affected the results of the election. *E.g. Safeway, Inc.*, 338 NLRB 525, 171 LRRM 1169, 1170 (2002). The Union has failed to meet that burden with evidence at hearing and in its brief in support of Exceptions. Instead, the Union's brief does little more than characterize events with the use of pejorative terms while frequently failing to cite to facts in the Record. For example, the Union criticizes Multiband's use of a "union consultant" and characterizes Multiband's captive audience speeches to its employees as "'union busting' meetings." (Union's brief, p. 3). It claims Multiband's alleged denial of access was in "sharp contrast" to past practice without establishing that the alleged "past practice" was anything other than the procedure contractually provided for in Article 10, Section 2 of the parties' collective bargaining agreement ("CBA"). (Union's brief, p. 3). The Union then colors its history of access to Multiband's facilities as being "virtually unlimited" prior to the captive audience meetings without any citation to the

[1] Citations to the Transcript of the Official Report of Proceedings before the National Labor Relations Board on August 1, 2012 will be referred to as "Tr. _." Joint Exhibits to that Transcript will be abbreviated as "Tr. Jt. Ex. _." The Hearing Officer's Report on Objections and Recommendations to the Board, issued on September7, 2012 will be cited as "Report, p. _." The Brief of Union in Support of Exceptions to Hearing Officer's Report and Recommendations, filed on September 28, 2012, will be referred to as "Union's brief, p. _."

Record or the Report. (Union's Brief, p. 3). The Union claims it visited Multiband's facilities "on at least 154 occasions;" however, the Record citations provided by the Union do not support that statement nor does the Record as a whole establish such numerous visits occurred. (*See* Union's brief, p. 3). The Record does establish, however, that in the Fall of 2010, Multiband began enforcing Article 10, Section 2 of the parties' CBA regarding union access and the Union acquiesced to such enforcement. (Report, p. 4; *See* Tr. Jt. Ex. 3). None of these unsupported characterizations relied upon by the Union amount to objectionable conduct; nor do they assist the Union's arguments in support of its objections or its exceptions to the Hearing Officer's Report.

Instead of demonstrating the alleged objectionable conduct at issue materially affected the results of the election or explaining why its Exceptions to Hearing Officer Beck's report should be granted, as required by Board law, the Union's brief takes issue with Multiband's presentation of its defense and attempts to improperly place this burden on Multiband, the non-objecting party. For example, the Union's brief unnecessarily chides Multiband for "not call[ing] any employees who attended any of those [captive audience] meetings" and "[p]rovid[ing] no documentary evidence, such as the notes [Henry] took." (Union's brief, p. 5).

Likewise, the Union's brief in support of its Exceptions contradicts itself. For example, in support of its Exceptions regarding Objection No. 1, the Union requests that:

> The Board should take notice that each of the 23 questions in the May 23, 2012 letter demonstrates a level of sophistication and knowledge few employees are likely to have possessed.

(Union's brief, p. 5). A few pages later, during its discussion of Objection No. 2, the Union argues the opposite inference. The Union argues that despite all of the written statements from

the Company that the upcoming election is a deauthorization election; employees should have an interpretation of receiving unstated benefits if and when some future decertification petition is filed and a if and when a decertification election was to be held. (*See* Union's brief, p. 13). Similarly, the Union declares, as part of its Exceptions to the Report, that Multiband had no reason to discuss decertification with its employees in the May 23rd letter at issue in Objection No. 1. (Union's brief, pp. 13-14). The Union immediately contradicts that argument on the same page, by footnoting a request to the Board to take notice that the instant deauthorization election came on the heels of a decertification election "declared untimely by virtue of the contract bar rule and withdrawn." (Union's brief, p. 14, fn.5).

Likewise, the Union's rationale supporting its arguments regarding its claimed need for access to captive audience meetings suggests that when an employer mails a letter to employees, the letter is influential, but if the union were to mail a letter to employees, it would be meaningless. At hearing, the Union requested a stipulation that May 23rd letter was sent to all eligible employees. (Tr. 104:9-105:24). The Union argues the mass-mailing of this letter meaningfully impacted employee free choice and states it had no means to combat the employer's "campaign" without on-site access to technician and captive audience meetings. (Union's brief, pp. 16-18). The Union also claims it did not have the phone numbers and addresses of its members to contact them, in its further attempts to establish that denial of on-site access to captive audience meetings was material. (Union's brief, pp. 16-18). However, the Union omits the fact that it never asked the Employer for this information. (Tr. 42). Further, the Union then admits it had the home address of each eligible voter. (Tr. 36). Not only did the Union have access to the employees in the Multiband parking lots and loading areas, the Union could have also mailed letters to employees, just as Multiband did. Moreover, the United States

Supreme Court has made clear where a union has other means to carry its message to employees, an employer does not commit an unfair labor practice if he makes a pre-election speech on company time and premises to its employees and denies the union's request for an opportunity to reply. Tr. 33:22-4; *NLRB v. Steelworkers (Nutone, Inc.)*, 357 U.S. 357 (1958); *see also Livingston Shirt*, 107 NLRB 400 (1953). As will be explained in greater detail below, Hearing Officer Beck properly found the Union's Objections meritless and the Union has presented no cogent arguments to support any of its Exceptions to the Hearing Officer's Report and thus the Union's Objections should be overruled and the results of the Election certified.

2. The Union's Statement Of Evidence Relevant To Objection No. 1 Omits Key Portions Of The Record And Uses Hyperbole To Mischaracterize The Record.

The Union's brief presents only a brief snippet of Multiband's May 23rd letter to its employees, excerpted out of its full context in an attempt to portray Multiband's lawful correspondence as something more sinister. (Tr. Jt. Ex. 2; Union's Brief, p. 4). Indeed, the Union excerpts the following in support of its arguments:

> The May 23 letter at issue states, in pertinent part, as follows:
>
> Q. How soon after we de-certify will we get the non-union benefits?
> A. We can't say you will or will not get additional benefits if this union is ever de-certified. . .

(Union's brief, p. 4). However, Multiband's entire answer reads as follows:

> A. We can't say you will or will not get additional benefits if the union is ever de-certified. **We don't know whether or not a de-certification election will ever take place. That is a decision that our associates will decide, not Multiband. As a Company we are presuming that next year we will be negotiating a new Agreement with the Teamsters Union.**

(Tr. Jt. Ex. 2 (Emphasis added to text of letter that was omitted from Union's brief)). The complete response, as explained by Multiband's Regional Vice President, Roy Henry, noted as

credible by Hearing Officer Beck, establishes that no objectionable conduct occurred. (Tr. 109:9, 118:11-19; Report, pp. 7-8).

3. The Hearing Officer's Report Relied On Well Established Board Precedent By Finding *Viacom Cablevision* Controls The Outcome Of Objection No. 1 Instead Of *G&K Services.*

Contrary to the Union's assertion that *G & K Services*, 357 NLRB No. 109 (2011) ("G&K") should be controlling in this matter, Hearing Officer Beck correctly acknowledges and applies *Viacom Cablevision*, 267 NLRB 1141 (1983), as controlling authority. In *G&K*, the employer distributed an unsolicited letter to its employees discussing the specific benefits made available to its employees who had recently voted to decertify their union. 357 NLRB No. 109 , at 2. Conversely, Multiband's May 23rd correspondence was drafted and distributed in response to specific inquiries made by its employees during meetings with management. (Report, pp. 7-8; Tr. 118:11-19). As the Hearing Officer found regarding the benefits available to Paducah employees who had decertified, the letter merely stated that those employees received the same benefits as the Multiband's nonunion employees. (Report, pp. 7-8; Tr. Jt. Ex. 2). In fact, the letter made no comparison of the employees' current benefits with those received by the Paducah employees, who had previously been represented under a contract with the Communications Workers of America (*not* Teamsters, Local 135). (*See* Tr. Jt. Ex. 2).

Further, as the Hearing Officer found, the letter's lack of specificity ensured any discussion of benefits could not logically be connected to a possible decertification election in a manner that would somehow affect the employee's vote in some future decertification election, should such an election ever occur. (Report, p. 8). Indeed, the Hearing Officer correctly explained the events at issue occurred in response to a deauthorization election, not a decertification election. (Report, pp. 7-8). Multiband explicitly denoted in its letter that the

employees would continue to be represented by the Union, regardless of the results of the forthcoming deauthorization election, to prevent any confusion that may have occurred as a result of the decertification election that had been filed one month prior to the deauthorization election. (Tr. 113, 116). Thus, as Hearing Officer Beck correctly ruled, the Union's argument that any discussion of the benefits ultimately conferred upon Multiband's Paducah employees is far too attenuated to have impacted a future decertification election. (Report, pp. 7-8).

In addition, as Hearing Officer Beck concluded, the disclaimers in Multiband's May 23rd letter are distinguishable from the weak disclaimers contained in the letter at issue in *G&K*. (Report, pp. 7-8). The letter in *G&K* contained a disclaimer stating, "By law I can't make any promises about what will happen in Portsmouth if the union is decertified, I can share with you that just last week the production employees in Memphis were able to sign up for health insurance that covers their spouses and children for the first time." 357 NLRB No. 109, at 2. There, the Board found the letter's language implied health insurance benefits enjoyed by the Memphis (non-union) employees would be immediately provided to the Portsmouth employees. *Id.*

Conversely, Multiband's May 23rd letter made clear that the CBA would remain in effect and stated the employer's clear intention that, "As a Company we are presuming that next year we will be negotiating a new Agreement with the Teamsters Union." (Tr. Jt. Ex. 2). Thus, Hearing Officer Beck correctly found that Multiband's statement was much stronger than G&K's with regard to its inability to promise any benefits to its employees and no unlawful promise of "non-union benefits" occurred. (Report, pp. 7-8).

In refusing to apply *G&K*, the Hearing Officer correctly analogized Multiband's question and answer letter to the letter at issue in the *Viacom Cablevision*. As in *Viacom* and its

progeny, Multiband distributed a letter to its employees containing truthful responses to inquiries made by employees regarding union and nonunion wages. *See e.g. Viacom Cablevision* 267 NLRB 1141, 1141-1142 (1983). The Board has long held in situations such as this that an employer does not commit objectionable conduct when it "truthfully inform[s]" its employees of the wages and benefits received by non-bargaining unit employees using "statements of historical facts." *Id.*; *see also Mastec North America, Inc.*, 2012 NLRB LEXIS 444, 43-45 (July 20, 2012) (explaining the employer's truthful statements at an employee meeting regarding the differences in benefits and wages provided at their union and nonunion locations did not violate Section 8(a)(1)). For example, in *KCRA-TV*, 271 NLRB 1288 (1984), the employer's owner conducted an employee meeting to discuss issues in an upcoming decertification election. In response to employees' questions regarding the employer's policies if the union were to decertify, the owner referenced the policies in place at a non-union bank, which the employer also owned. *Id.* at 1288. The owner was careful to preface statements with an express disclaimer cautioning the employees that he was not promising anything should the election result in the union's decertification. *Id.* at 1289. The Board found that the employer's statements did not amount to an implied promise because the employer simply made truthful statements describing the policies and procedures in place at its nonunion banks. *Id.*

Similarly, in *Duo-Fast Corp.*, 278 NLRB 52 (1986), in the weeks preceding a decertification election, the employer's Division Manager distributed a leaflet comparing the medical benefits received by the employer's union employees with those benefits received by its nonunion employees. The comparisons were preceded by a disclaimer stating, "I'm not promising you better medical benefits if you vote 'No'...but you should know our nonunion employee's medical benefits." *Id.* at 52. Additionally, the Division Manager held meetings with

his employers during which the employees were given the opportunity to question him regarding, among other pertinent issues, the information contained within the leaflet. *Id.* at 52-53. The Division Manager was careful to repeat the disclaimer at these meetings. In response to one employee's question regarding how quickly those benefits would go into effect, the Division Manager responded "immediately." *Id.* at 52. The Board, relying on *Viacom Cablevision*, found that neither the leaflet nor the Division Manager's statements amounted to an implied promise of benefits if the employees were to vote to decertify the union. *Id.* at 52-53. The Board focused on three key factors in making this analysis. *Id.* at 52-53. First, it discussed the explicit disclaimer language used in both the leaflet and in the Division Manager's comments. Second, the Board acknowledged, as it had in *Viacom Cablevision*, that the Division Manager's answers were truthful responses to employee questions. *Id.* at 53. Finally, the Board indicated that the employer's conduct simply did not demonstrate any "extraordinary efforts" constituting an implied promise. *Id.* at 53. Because the facts presented at hearing firmly track those of *Viacom Cablevision* and because Multiband credibly demonstrated at hearing it simply intended to educate its employees by letter, the Hearing Officer rightly applied the *Viacom* analysis to Multiband's letter and the Union's Exceptions regarding the application of *Viacom* must be overruled.

4. The Hearing Officer's Report Relied On Well Established Board Precedent When Distinguishing A Deauthorization Election From A Decertification Election.

The Union's brief contains convoluted reasoning in support of its Exceptions regarding the Hearing Officer's differentiation between a deauthorization election and a decertification election, applying an extremely attenuated chain of causality to its argument. Specifically, the Union argues:

> There was no reason for the Employer to mention the Paducah decertification in the May 23 letter, or the fact that after that decertification the Employer had given those Paducah employees the "non-union benefit package," other than to convey a clear and unmistakable message to eligible employees that by voting in the deauthorization election against the Union's interests and in the manner being advocated by the Employer they, too, would also receive the 'non-union benefit package' if and when the Union were later removed from the picture altogether, as had the Employer's Paducah employees.

(Tr. Union's brief, p. 14). But, as the Union noted in its brief, not only had Paducah employees recently undergone a decertification election, but the unit at issue here also had an untimely decertification petition filed by Petitioner Cantu that immediately preceded this deauthorization election. (Union's brief, p. 14). The Hearing Officer, noting the credible testimony of Mr. Henry, also found that Multiband was answering questions posed by employees. (Tr. 118-19; Report, pp. 3, 7). The Hearing Officer properly considered the context of the Parties' history and the preceding deauthorization elections when applying those facts to his reasoning and analysis that the difference between a deauthorization and a decertification election was an important distinguishing factor when finding Multiband did not commit objectionable conduct. (Report, pp. 7-8).

5. The Union's Statement Of Evidence Relevant To Objection No. 3 Misstates The Record By Supplying Its Own Unsubstantiated View Of Prior Access Pattern Instead Of Fact.

The facts, as set forth in the Report and based upon testimony of Mr. Henry noted as credible by the Hearing Officer Beck, establish that in 2010, a time well in advance of the critical period for the instant deauthorization petition, the employer began requiring prior notification from Union representatives intending to visit employer property, consistent with the plain language of the parties' CBA. (Report, p. 4; Tr. 36:5-11, 51: 10-14, 68:16-18, 71:21-75). Indeed, Article 10, Section 2 of the CBA states:

> Union officers may visit and have access to the facilities covered by this agreement at reasonable times during regular business hours for the purpose of reviewing records or files in connections with the investigation of a grievance, attending grievance meeting with management and/or conferring generally with management officials and/or bargaining unit employees pertaining to the terms and conditions of this Agreement. **Union officers shall not enter the interior of the Employer's facilities without the express authorization and approval of the designated management representative, in advance.** The Union will use its best efforts to give the Employer as much advance notice as possible of any visit to the company premises. **In addition, should the Union officers desire to conduct Union business with unit employees, they may do so only on the employee's non-work time and in non-work areas.** Union officers shall not interfere with the performance of work by employees. The Union shall not conduct general membership meetings in the Employer's facilities or parking lot.

(Tr. Jt. Ex. 1 (emphasis added)). The Union's testimony uniformly established it acquiesced to enforcement of the plain language of that contractual term, and confirms the Union reached out to management prior to visiting the employer's campus, as required by the parties' CBA. (Report, p. 4; *See* Tr. Jt. Ex. 3).

Despite the testimony of the Union's representatives and arguments in the Union's brief that the Company denied the Union access to tech meetings and facility interiors and that this denial affected the outcome of the election, the testimony of the Union's own witnesses at hearing are completely contrary to this statement. For example, as Hearing Officer Beck noted, both Business Agent Rowan and Business Agent Warnock testified they were able to speak with employees in Multiband's loading areas and parking lots. (Report, p. 4, 9-10; *see also* Tr. 36:5-11, 51: 10-14, 68:16-18, 71:21-75). Hearing Officer Beck also noted that in the few instances where Management requested the Union reschedule its visits , the Union failed to do so. (Report, pp. 9, 10). For example, Business Agent Neil Matthews was asked to reschedule, yet

he admitted he did not do so. (Report, p. 9; Tr. Tr. 42:9-12; Tr. Jt. Ex. 3). Thus, Hearing Officer Beck's determinations must stand.

6. The Union's Exceptions To The Report's Credibility Determinations Regarding Mr. Henry's Testimony About The May 23rd Letter And The Cancellation Of The May Inventory Count Are Improper And Must Be Denied.

Courts have long held credibility determinations are an issue for the hearing officer, especially when those determinations depend on the observation of the witnesses' demeanor at the hearing; thus credibility determinations by the hearing officer will not be overturned. *E.g. NLRB v. Walton Mfg. Co.*, 369 U.S. 404 (1962).

A. Henry credibly testified regarding the May 23rd letter.

Multiband presented Mr. Henry, who although not the drafter of the May 23rd letter, had knowledge of the letter's genesis and distribution; the Union presented no evidence to the contrary. (Tr. 118:11-19). Indeed, as Hearing Officer Beck noted:

> [T]he May 23 letter indicates on its face that it contains questions that were raised in various meetings with employees. In addition, the Employer's Regional Vice President Roy Henry testified at the hearing that the questions contained in the May 23 letter had come from meetings with employees conducted by the Employer, and there was no evidence contradicting this testimony by Henry.

(Report, p. 7). The Union's brief criticizes the employer for putting forth a sole witness, Regional Vice President, Roy Henry, in support of its position; however, as a non-objecting party, the Employer had no obligation to put on any case. (Union's brief, p. 4); *see Safeway, Inc.*, 171 LRRM at 1170 (burden on objecting party to establish free choice was materially affected).

Similarly, the Union criticizes the employer's legal strategy of presenting the only management employee it believed necessary to rebut the Union's allegations; it does so to defend its own unpreparedness for hearing. Indeed, the Union's brief disapproves of the Employer's decision not to present testimony by Kent Whitney, the author of the May 23rd letter (*see* Union's

brief, p. 4); however, if the Union so desired Mr. Whitney's testimony, it could have subpoenaed him. Above all, after the Union rested its case, Hearing Officer Beck offered the Union the opportunity to present evidence regarding the May 23rd letter at issue; however, Counsel for the Union declined, requesting only a stipulation that the May 23rd letter was sent by Multiband to all eligible voters. (Tr. 104:9-105:24).

Without any evidence to the contrary, the Union cannot overcome Hearing Officer Beck's credibility findings and thus the Union's exceptions regarding Mr. Henry's testimony must be overruled. *E.g. Tuf-Flex Glass v. NLRB*, 715 F.2d 291, 295 (7th Cir. 1983) (factual turning on hearing officer's assessment of witness credibility and demeanor may not be overturned absent the most extraordinary circumstances).

B. Henry Credibly Testified To The Employer's Rationale For Cancelling The May Inventory Count.

Regarding the Union's allegations that Multiband cancelled monthly inventory to prevent union access to its employees, the Union's brief ignores two established facts: (1) the inventory counts were not meetings in the sense that employees would be gathered in one large group; instead, employees arrived in small groups as they finished their respective assignments, and (2) the May inventory count was scheduled for a time when the ballots had been mailed so the Union could not have lawfully executed its plan to meet with employees in small groups as they arrived for inventory. (Tr. 27); *see e.g. Or. Wash. Tel. Co.*, 123 NLRB 339, 43 LRRM 1430 (1959) (election speech on company time prohibited from date of ballot dispatch until prescribed time for ballot return). As Roy Henry testified and Hearing Officer Beck credited, Multiband's intent behind cancelling May inventory count was not to foil union access to membership – it was to limit interaction between management and its associates (Tr. 109:9-21; Report, pp. 10-11). The Union has not presented any evidence to contradict Mr. Henry's testimony or Hearing

Officer Beck's findings and thus this exception must be overruled. *E.g. Tuf-Flex Glass*, 715 F.2d at 295.

7. The Hearing Officer's Report Relied on Well Established Board Precedent When it Established the Employer had not Changed its Access Policy nor had the Employer Denied the Union's Representatives Access in any Material Manner.

In support of Objection No. 3, the Union alleges Multiband changed its access to employees in a material manner. Contrary to the Union's assertion and consistent with the Hearing Officer's findings, the Union failed to establish any past practice or any material impact on its access to unit members. (Union's brief, p. 25; Report, pp. 8-10). The Union's brief cites to inapposite authority attempting to establish (1) a past practice of unfettered access to the interior facility and mandatory meetings existed; and (2) Multiband unilaterally changed that past practice in response to the deauthorization election in a manner that materially affected employee free choice. Despite the Union's contention, the facts established at hearing demonstrate Multiband granted the Union access consistent with the provision of the parties' CBA and no meaningful change in the Union's access rights as granted by the CBA occurred. (Union's brief, p. 25; Report, pp. 8-10).

A. The Union Failed To Establish A Past Practice That Contravened The Plain Language Of The CBA.

First, the Union relies on *Ernst Home Centers, Inc.* for the proposition that an employer's refusal to grant a business agent, attempting to meet with employees, access to the employer's sales floor (a work location on work time) is automatically a material change. However, the Union's brief neglects to mention the pivotal and distinguishing fact in *Ernst Home Centers, Inc.* was that the employer had *not* afforded that union's representatives *any* other access to its employees and continued to refuse the union access to the back room, where

employees took their breaks. *Ernst Home Centers, Inc.*, 308 NLRB 848, 142 LRRM 1310, 1311 (1992); (Union's brief, p. 25). As the Hearing Officer established, relying on the access rules set forth in *Turtle Bay*, the undisputed facts in this case establish Local 135 had other means to access its members than attending technician meetings and more importantly, that Local 135 did access its unit members, by meeting with them in Multiband's loading, parking lots, and occasionally, inside of Multiband's facilities. (Report, p. 10).

Furthermore, the Union relies upon *Frontier Hotel* for the proposition that "any change that actually interferes with contractually agreed employee access to the unit collective-bargaining representatives for representation purposes is a material change." (Union's brief, p. 25). However, in doing so, the Union ignores the fact that the procedure followed by Multiband in response to the Union's request for access to Multiband's facilities was entirely consistent with the contractually agreed upon language of Article 10, Section 2 of the parties' CBA. (Tr. Jt. Ex. 1). Indeed, as the Report noted, "the language in the contract require[es] advance notice to the employer before the Union visited a facility." More importantly, the Hearing Officer credited Roy Henry's testimony, finding:

> Sometime in 2010, well before the critical period in this matter, management officials began requesting that the Union provide them with advance notice of any visit to the facilities, and Union agents have complied with that request. There was no evidence that the Union protested this change in any fashion. The Union simply began giving advance notice and were routinely allowed to visit the covered facilities and attend technician meetings.

(Report, p. 4). Thus, the practice is not one of "virtually unlimited" access, as claimed by the Union, but is actually one where the union must provide advanced notice, consistent with the requirement of Article 10, Section 10 of the parties CBA. (*See* Tr. Jt. Ex. 1, Jt. Ex. 3).

B. Any Alleged Change In Access Was Too Insignificant To Affect Employee Free Choice And The Hearing Officer Properly Applied Board Law When Overruling The Union's Objections Regarding Access To Captive Audience Meetings And Facility Interiors.

Further, the Union's objection regarding access must also fail because, even if the Union's access changed (as noted above, it did not), whatever "denial" that occurred had no more than a *de minimus* effect on the Union's ability to meet with its members. As the Hearing Officer correctly ruled, "the Union was still able to meet with employees on the Employer's premises, and all of the Union representatives who testified at the hearing in this matter said they were able to do so." (Report, pp. 4 & 10; *see also* Tr. 36:5-11, 51: 10-14, 68:16-18, 71:21-75, Tr. Jt. Ex. 3). The Hearing Officer's finding is consistent with longstanding Board precedent. For example, in *NLRB v. United Steelworkers of America (Nutone, Inc.)*, the Supreme Court held that an employer may lawfully maintain and enforce valid rules against solicitation or literature distribution by employees even if the employer itself engages in the same conduct. 357 U.S. 357 (1958), The Court explained that the NLRA "does not command that labor organizations...are entitled to use a medium [of communications in the workplace] simply because the employer is using it." *Id.* at 364; *See also Beverly Cal. Corp. v. NLRB*, 227 F.3d 817, 846 (7th Cir. 2000).

Further, when determining whether a limitation on Union access to Employer property is an unfair labor practice, the Board should look for "relevant alternative channels for communications" that the union may access in light of the employer's rule." *Id.* Reviewing courts and administrative agencies should then compare the access of the employer to the access of the union to determine "whether or not the...employer conduct produced an *imbalance* in opportunities for organizational communications." *May Dep't Stores Co. v. NLRB*, 316 F.2d 797, 799 (6th Cir. 1963). If no such imbalance exists after the review of the extant alternatives for

communication, than the employer's anti-solicitation rule will likely not be found to be an unfair labor practice.

For example, in *May Dep't Stores Co. v. NLRB*, the Sixth Circuit reviewed a company's rather broad rule prohibiting solicitation of any kind on company premises. 316 F,2d at 797. The company's representatives held captive audience meetings where they made anti-union speeches to the employees on the employer's premises. The employer refused the union's requests to for an opportunity to address the employees under similar circumstances. The union alleged that this amounted to an unfair labor practice because it was forced to reach employees through other methods such as telephone contacts, off-property handbilling, television time, radio time, newspaper space, meetings at the union hall, and home contacts. The Board held that this rule created an obvious imbalance in the unions' opportunity to reach the employees. The Sixth Circuit disagreed. The Court explained that "access to the employer's property is *not an obligation of the employer to non-employee organizers* unless geographic and communications factors render the employees inaccessible, despite reasonable union efforts to reach them with a pro-union message." *Id.* at 799 (Emphasis added). "That a speech during working time on company premises may be preferable to use of contacts away from the work-site cannot in and of itself render the employer's conduct unfair under the Act." *Id.* at 800-801. The Sixth Circuit ultimately held that "absent a showing of non-accessibility amounting to a handicap to self-organization, non-employee solicitors had no right of access to company premises because they were strangers to the employees' guaranteed right of self-organization." *Id.* at 801.

Because Hearing Officer Beck overruled the Union's Objections regarding access to facility interiors and captive audience meetings in a manner consistent with Board law, which has never required a union be granted such access and because he properly found that despite

any alleged denials of access, the Union admittedly met with its membership in Multiband's loading areas and parking lots, as well as sometimes inside Multiband's facilities, Objection No. 3 and the related Exceptions to the Report must be overruled.

CONCLUSION

The Union's Exceptions to the Report of the Hearing Officer in support of its Objections are meritless and the results of the election, 524 votes cast in favor of deauthorization out of the 963 eligible voters should be upheld as valid, the Objections overruled, and a certification of the election results should be issued.

DATE: October 5, 2012

By: *s\ Gregory H. Andrews*

Gregory H. Andrews
Attorney for Employer, Multiband EC, Inc.
Gregory H. Andrews (IARDC No. 6209480)
Jackson Lewis LLP
150 North Michigan Avenue, Suite 2500
Chicago, Illinois 60601
Gregory.andrews@jacksonlewis.com
(p) 312-787-4949

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

MULTIBAND EC INC.,	)	
	)	
Employer,	)	
	)	
and	)	
	)	
CHAUFFEURS, TEAMSTERS, WAREHOUSEMEN and HELPERS LOCAL UNION 135,	)	**Case No. 25-UD-079779**
	)	
Union,	)	
	)	
And	)	
	)	
ORLANDO CANTU,	)	
	)	
Petitioner.	)	

CERTIFICATE OF SERVICE

I, Gregory H. Andrews, certify that on October 5, 2012, I caused to be filed in the above-captioned matter via electronic filing with the National Labor Relations Board, a copy of **EMPLOYER'S ANSWERING BRIEF IN OPPOSITION TO LOCAL 135'S EXCEPTIONS.** One copy of the above document is also being sent via U.S. Mail, proper postage paid, to:

Mr.William Groth, Esq. **Fillenwarth Dennerline Groth & Towe, Llp** **429 E. Vermont Street, Suite 200** **Indianapolis, IN 46202**	**Mr. Michael T. Beck, Hearing Officer** **National Labor Relations Board, Region 25** **Room 238, Federal Office Building** **575 North Pennsylvania Street** **Indianapolis, IN 46204**
Mr. Orlando Cantu **P.O. Box 192** **Ambia, IN 47917**	**Mr. Rik Lineback, Regional Director** **National Labor Relations Board, Region 25** **Room 238, Federal Office Building** **575 North Pennsylvania Street** **Indianapolis, In 46204**

s\ Gregory H. Andrews
Gregory H. Andrews